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Foreward

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FOREWORD

*“Yet he is actually not far from each one of us, for
‘In him we live and move and have our being’”*

The Apostle Paul,¹
quoting Epimenides’ poem Cretica (6th century B.C.)

We see the appearance of order all around us. At every level of human observation—from molecular to galactic and beyond—we are confronted by precision, beauty, and an eerie resonance with our own mind. Moreover, further investigation reveals what looks like direction, purpose—even *design*. Is this perception real or just an illusion? And, most importantly for this Symposium, may that question be asked—or answered—in a public school?

This year marks the bicentennial of the birth of Charles Darwin. It is also the 150th anniversary of his culture-changing book, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*. In this important year, much of academia is celebrating the significance of Darwin’s work. But some are also seriously critiquing it. Among them is a group of scientists who suggest that various biological phenomena cannot be fully explained by Darwin’s theory of random mutation and natural selection. Rather, these scientists propose that many aspects of the biological world can only be explained in terms of purposeful engineering. Their alternative explanation has come to be known as intelligent design (ID).

Over the last several years, this debate between those who affirm Darwin’s theory and those who question it has ignited a firestorm of controversy. Following the unfortunate path of many of America’s important social issues, the debate was eventually brought before a federal court in *Kitzmiller v. Dover Area School District*.² *Kitzmiller* involved many of the issues of this Symposium: May evolution be questioned, or ID taught, in public schools? Is ID religion? Is it science? Is it both, or perhaps neither? And, What should we do about it? Yet, as in most cases involving scientific or social issues outside judges’ expertise, the court’s lengthy opinion did little to settle the public debate.³

1. *Acts* 17:27-28.

2. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

3. Moreover, investigation revealed that the opinion’s discussion of “whether ID is science” was largely cut-and-pasted from the anti-ID plaintiffs’ proposed order. See John G. West & David K. DeWolf, A Comparison of Judge Jones’ Opinion in *Kitzmiller v. Dover* with Plaintiffs’

In the wake of *Kitzmiller*, many sources weighed in from all sides of the debate. The pro-ID Discovery Institute published a critique of the court's decision, entitled *Traipsing into Evolution*.⁴ Later, attorney/actor Ben Stein's documentary movie *Expelled*⁵ alleged that pro-ID professors were being ostracized by the science establishment. The National Center for Science Education, an opponent of teaching ID in public schools, responded with *ExpelledExposed.com*, a critique of Stein's critique. Other pro- and anti-ID groups joined the fray, all adding fuel to the public fire.

In February 2009, Liberty University School of Law hosted a Symposium to examine the legal side of the debate. The question for discussion: May ID be taught in public schools? Several speakers' responses are published in this issue. They represent multiple spokes in the wheel of the debate; while the authors concur broadly on some points, they diverge on others. The following is a summary of their articles, comparing and contrasting their views on important issues within the debate.

The Meaning of "Religion"

The U.S. Supreme Court has never given a comprehensive definition of "religion" for purposes of the Religion Clauses.⁶ The Court has preferred instead to categorize particular activities or beliefs as either religious or non-religious. Nevertheless, in non-constitutional cases, the Court has given some guidance regarding its understanding of what constitutes religion, while also commenting broadly on the concerns and factors that may bear upon its decision in a given case. Moreover, lower federal and state courts have given more detailed analysis to the matter of defining religion. Based on these jurisprudential clues, the Symposium authors propose various definitions of religion for constitutional cases in general and public school decisions in particular.

John Calvert advocates a broad, "functional" definition of religion. In his view, "religion" means *a set of beliefs regarding matters of ultimate*

Proposed "Findings of Fact and Conclusions of Law" (Dec. 12, 2006), <http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=1186>; see also Casey Luskin, Analogical Legal Reasoning and Legal Policy Argumentation: A Response to Darwinist Defenders of Judge Jones' Copying from the ACLU (Jan. 22, 2007), <http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=1209> (arguing that such copying is disfavored by courts).

4. DAVID K. DEWOLF ET AL., *TRAIPSPING INTO EVOLUTION: INTELLIGENT DESIGN AND THE KITZMILLER V. DOVER DECISION* (2006).

5. *EXPULSED: NO INTELLIGENCE ALLOWED* (Premise Media 2008).

6. *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 655 F. Supp. 939, 975 (S.D. Ala.), *rev'd on other grounds*, 827 F.2d 684 (11th Cir. 1987).

concern that function in the lives of their adherents analogously to traditional theistic beliefs. He asserts that this definition includes beliefs regarding the cause, origin, nature, and purpose of life, as these are the *ultimate* “matters of ultimate concern.” This definition also includes not merely beliefs *in* a deity, but also beliefs *about the existence of* a deity. According to this perspective, belief and disbelief are functionally equivalent. Moreover, because “secular” is defined residually as that which falls outside religion, a broader definition of “religion” results in a narrower definition of “secular,” and vice versa.

Calvert gives several reasons for this broad definition of religion. Initially, he explains that although religion and science may have been separate, mutually exclusive subject matters as late as the nineteenth century, there is now substantial overlap between them. This is because, first, the proliferation of non-Western, nontraditional, and especially non-theistic belief systems in this country in the last century necessitates a more inclusive understanding of what constitutes a religion. Second, the nineteenth-century expansion of science into the study of life’s origins caused science to cover ground previously occupied primarily by religion. Thus, religion and science are no longer mutually exclusive, but now overlap when they address origins.

Further, Calvert argues that a broad definition of religion is needed because a narrow, theistic definition excludes non- or anti-theistic belief systems, creating an inherent viewpoint bias at the definitional level. This bias, in turn, violates the doctrine of religious neutrality that the Supreme Court has repeatedly said is required by the Establishment Clause. In addition, such a gerrymandered definition of religion denies equal protection to non- or anti-theistic religious groups by giving preference to functionally equivalent theistic groups. Courts can avoid these viewpoint bias and equal protection problems by evaluating only the subject matter (content) and function of belief systems.

As a corollary, Calvert points out that the word “religion” cannot have one meaning in the Establishment Clause and another in the Free Exercise Clause. Similarly, a non-theistic group cannot label its views as religious to gain the protections provided by both Religion Clauses, while simultaneously labeling its views as non-religious to avoid the Establishment Clause’s prohibition of governmental endorsement. The constitutional definition of religion must be both consistent and consistently applied.

Moreover, Calvert proposes that to qualify as religious, beliefs must form a comprehensive system. This prevents an isolated teaching that happens to comport with one or more religious belief systems from being

mistakenly labeled as religious. Professor Johnny Buckles and Casey Luskin seem to agree that a proposition is not necessarily religious simply because it harmonizes with a particular religious view.

Calvert also notes that his definition of religion is objective, in that it does not look to whether the holder of the belief characterizes the belief as religious. Finally, when a court applies the Endorsement test's "reasonable, objective observer" standard, the hypothetical observer must be thought of as understanding the meaning of "religion" according to the *legal* definition. Thus, the observer must be presumed to have in mind the broad, functional definition of religion, and not a narrower, colloquial one.

Professor Johnny Buckles also surveys Supreme Court case law regarding the meaning of religion. Buckles concludes that no precise definition can be formulated. However, he pieces together clues from the Court's language and synthesizes them into three characteristics that identify a religion: (1) a relational perspective (between humans and a deity or simply between humans), (2) a devotional and moral orientation, and (3) (often) a doctrinal grounding.

Is Evolution or ID Religious?

John Calvert argues that because the question of whether biological life has a natural or intelligent cause is included within the above-described category of "matters of ultimate concern," this question is inherently religious. In turn, because both evolution and ID attempt to answer this question, both approaches are religious. Conversely, Calvert would categorize as "purely secular" such subjects as mathematics, modern foreign languages, physical science, and physical education, because they generally do not address "matters of ultimate concern."

Professor Johnny Buckles and Casey Luskin disagree. According to their understandings of "religion," neither evolution nor ID is inherently religious. In Buckles' view, neither evolution nor ID, taken by itself, meets religion's three characteristics: neither has a relational perspective, a devotional and moral orientation, or a doctrinal grounding. Although both may be foundational to various metaphysical conclusions, the theories themselves are not inherently religious. Luskin concurs, arguing that teaching evolution is not an endorsement of atheism or secular humanism. Based on these conclusions, it appears that Buckles' and Luskin's views of what constitutes "religion" are somewhat narrower than Calvert's.

Buckles also highlights a variety of positions regarding evolution among theistic religious groups and individuals. He shows that current theological conceptions of origins are not monolithic, but occupy various points along a

broad spectrum of degrees of compatibility with evolution. Based on this range of opinions, he concludes that evolution and Christianity are not necessarily and inherently in conflict.

Luskin focuses on a slightly different Establishment Clause problem: anti-ID academics' propensity to attack ID as "religious." Luskin argues that these affirmative displays of disapproval of supposedly "religious" explanations of origins *on the basis that they are religious* violate the Establishment Clause. Specifically, he contends that this practice violates the *Lemon* test's prohibition against inhibiting religion. On this point, Luskin's analysis aligns closely with Buckles' view that a school board's forbidding the teaching of ID based on its religious implications may violate the Establishment Clause.

However, Luskin observes that anti-ID educators also tend to oppose ID with arguments regarding its scientific correctness. He thus brings to light a dilemma that confronts anti-ID educators: either ID is religious and thus constitutionally may not be affirmatively opposed or inhibited in public schools, or ID is *not* religious and thus constitutionally may be *endorsed* in public schools. Also, under the Establishment Clause, these educators may not seek to rebut ID on a scientific basis, while simultaneously prohibiting others from advocating ID on the ground that it is "religious." Constitutionally, anti-ID educators cannot have their cake and eat it too.

Luskin also contends that under the Establishment Clause, educators may not propose or advance theological implications of either evolution or ID. Finally, Luskin argues that public school teachers may not advocate pro-evolution religious viewpoints, whether theistic or non-theistic. Calvert also notes a tendency of anti-ID educators to enlist liberal mainline churches to give evolution religious respectability. Luskin concludes that these practices violate the *Lemon* test, the Endorsement test, and the neutrality doctrine that transcends the various tests. Luskin also provides many examples of these practices from public school curricula and other documents.

Is ID Science?

John Calvert posits that true science is characterized by objectivity, not orthodoxy. He argues that because ID is merely an observation based on an open-ended inductive inquiry into the evidence, unbounded by naturalistic fences, ID is not an orthodoxy and thus *is* science.

Conversely, Calvert contends that one of the chief institutional barriers to ID—methodological naturalism—is an orthodoxy and thus does not belong within the category of science. Methodological naturalism (MN) is

the exclusion of any possibility of non-natural or intelligent causes from scientific inquiry. Calvert points out that MN is not a testable, *a posteriori* conclusion based on evidence. Rather, it is a methodological convention, an *a priori* assumption in certain types of scientific inquiry. Thus, any conclusions derived from such an inquiry are necessarily tentative, because their accuracy depends on the truth of the underlying, untested assumption. But Calvert finds that science students are not told this. Rather, their teachers put forward MN as an unquestionable fact, a dogma of scientific academia. Moreover, scientists defend MN with an Inquisitional zeal that will not tolerate critical analysis. Accordingly, Calvert argues, MN is an orthodoxy, an assumption based on faith, and thus cannot be categorized as scientific.

Moreover, Calvert contends that MN actually impedes scientific progress. For example, he observes that evolutionary biology, like crime scene investigation, is a historical science that depends on ruling out competing hypotheses. However, MN bars some relevant hypotheses from the start, thus protecting the remaining ones from healthy competition. Professor Barbara Mouly's article also points out the inherent circularity of excluding ID on the basis of MN.

Furthermore, Calvert argues that MN is in tension with the scientific method itself. The scientific method was developed to remove preconceptions from the scientific process, but MN inserts them back into it. Also, while MN is an exclusive working hypothesis in origins science, it is not adhered to in various operational sciences. For example, biology presumes that organisms have a function, but MN provides no grounds for this presumption.

Similarly, Professor Johnny Buckles believes that although MN is important to scientific inquiry, *exclusive* MN is neither necessary nor necessarily beneficial to the scientific process. Buckles proposes an *inclusive* form of MN that would leave the door open for non-natural causes. Under this view, ID's possible implication of non-natural agency does not exclude it from the category of science.

Edward Sisson writes his article to trial judges presiding in ID cases. He highlights the importance of conducting disinterested intellectual inquiry, independent from popular opinion. By extension, his exhortations would apply to lawyers, law students, and all others who would be leaders in society.

Sisson argues first that wise judges must be careful to take into account the voice of the dissident minority. This is needed, first, because majoritarianism is irrelevant to the search for truth. And second, only with

the benefit of considering opposing perspectives can judges achieve the quality of decision making that is needed in sensitive, controversial areas.

Turning to the science, Sisson focuses on evidence of ID in molecular biology. Writing from an MIT architecture graduate's perspective, he considers several pieces of molecular biology that do not fit well into evolution's puzzle. He also summarizes the process of DNA mutation needed to produce a novel protein, showing the number of filtering steps that would have to be overcome to produce a beneficial new protein.

Probably Sisson's most important contribution is his insightful analysis of sociological forces influencing scientific academia. He explains the battle, begun in the late eighteenth century, between scientific and religious institutions to provide a culturally dominant "creation story." The group that gains the greatest public acceptance of its explanation of human origins, Sisson observes, also gains the greatest "market share" of the public's attention, respect, and funding. Thus, he argues, scientific academia has an institutional self-interest in maintaining dominance. This especially means keeping out all ideas that would lend credence to its challengers.

Furthermore, Sisson highlights examples of ways in which the scientific community's consensus has been wrong in the past, and of how begrudgingly old theories die. Last, he crystallizes several rules that are not necessary to scientific inquiry but that he believes scientific academia uses to protect its sociological interests:

- (1) old theories can be let go of only when a better theory is put forward;
- (2) *stare decisis* applies to science, raising ever higher the burden of proof for competing new theories the longer the old one has been in place;
- (3) scientific merit can be established only by consensus of experts, not by public discourse and debate; and
- (4) questioning voices must be silenced by social pressure.

Finally, Professor Barbara Mouly argues for the plausibility of ID from principles of causation. She observes that both tort law's rules of causation and the ID hypothesis rely on probability theory and statistical analysis. Thus reasoning by analogy, she brings insights from tort law into the ID debate. She argues that although these tort rules are necessarily imprecise, they are grounded on universal principles of logic and common sense.

What To Do About It

John Calvert observes that government-sponsored education can treat religious subject matter in only one of two ways: (1) exclude it, or (2) retain it and treat it objectively and neutrally. However, an option the government does not have is to retain the subject matter but treat it non-neutrally by allowing only one view. Yet this is exactly what happens when public schools address the inherently religious subject of origins but include only evolution, Calvert argues. To restore religious neutrality to the teaching of origins, public schools must include ID in that teaching.

Professor Johnny Buckles analyzes the constitutionality of either *requiring* or *forbidding* the teaching of ID, evaluating both policies under the *Lemon* test and the Endorsement test. In particular, he reviews the Supreme Court's two cases on origins—*Epperson v. Arkansas* and *Edwards v. Aguillard*—and explains his view of the proper interpretation of these cases' holdings. Based on this interpretation, Buckles argues that requiring the teaching of ID is not necessarily inconsistent with either case's approach. Rather, the constitutionality of such a requirement depends on certain case-specific factors. Furthermore, he concludes that *forbidding* the teaching of ID may also meet or fail the *Lemon* test, again based on case-specific factors. He explains in detail what those factors are. Ultimately, Buckles concludes that under the relevant case law, requiring the teaching of ID in public schools *may* be constitutionally permissible in certain cases. He also finds that *forbidding* the teaching of ID may be *impermissible* in certain cases.

The Liberty University Law Review thanks the authors for their contributions to the ongoing worldwide debate over evolution and intelligent design. The Law Review also thanks Liberty University School of Law and Liberty University for their support of this Symposium.

Finally, the following prayerful muse is offered that we may approach this subject with humility and awe.

*O Lord, our Lord,
how majestic is your name in all the earth!*⁷

*We give honor to you,
for you have created all things,
and for your glory they are created.*

7. *Psalm* 8:1.

*We cannot search the highest heavens,
or plumb the depths of the deepest sea,
but you, O Lord, are there,
and your creation opens before us like a flower in full bloom,
singing its perpetual song and preaching its silent sermon to all
mankind
of the glory of your name.*

*O God, when we think about ourselves, how small we are,
our own understanding is dwarfed by the complexity of your
world around us,
and we ask, "Who are we?"
and, "What have we done to deserve your attention?"
But then the light of your glory comforts us once more,
for even the sparrows' plight is within the breadth of your
infinite mind and care;
how much more we, O we of little faith?*

*And resting in the wonder of this assurance, we declare,
Barukh attah Adonai, Eloheinu, melekh ha'olam,
shehakol nihiyah bid'varo,
"Blessed are you, O Lord our God, King of the universe,
who brought all things into being by his word."*

*This reflection we bring in the name of your Son Jesus, who is the
Christ,
by whom, through whom, and for whom all things were
created,
and who is before all things,
and in whom all things are held together.*

*O Lord, our Lord,
how majestic is your name in all the earth!*

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